

COMMISSIONER OF
POLITICAL PRACTICES

EXHIBIT

3

DATE

2/11/15

SB

11-11-15



STATE OF MONTANA

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February 11, 2015

Honorable Jeff Essmann
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House State Administration Committee
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Re: Senate Bill 72
House Hearing Date: Wednesday,
February 11, 2015 at 8:00 AM
Sponsor: Senator Taylor Brown

Dear Chairperson Essmann and members of the Committee:

The Office of the Commissioner of Political Practices supports Senate Bill 72 and respectfully offers the following information to the members of the House State Administration Committee.

SB 72
MOTL
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1. NAME

2. DATE

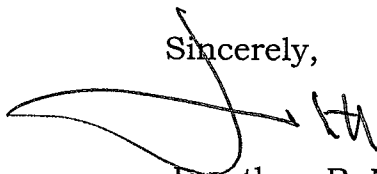
3. TIME

In May of 2012 the Sanders County Republican Central Committee challenged Montana's long standing (since 1935) prohibition of political party involvement in Montana's judicial elections. §13-35-231 MCA. The U.S. District Court for the State of Montana denied the challenge but on September 17, 2012 the US Court of Appeals for the 9th Circuit reversed and struck down portions of §13-35-231 MCA. *Sanders County v. Bullock* 698 F.3d 741; 2012 U. S. App. LEXIS 19522. On June 21, 2013 the 9th Circuit clarified that its earlier Decision struck down the §13-35-231 MCA "ban on [political party] endorsements and expenditures" but left intact the "contribution" ban. *Sanders County v. Fox* 717 F3d 1090; 2013 U.S. App. LEXIS 12755. A copy of the latter 9th Circuit Decision accompanies this testimony. The U.S. Supreme Court denied review (certiorari) on February 24, 2014 so the 9th Circuit's Decision is law.

SB 72 adjusts the language of §13-35-231 MCA to comply with the 9th Circuit's Decisions. SB 72 does this by removing the §13-35-231 MCA ban on political party endorsement and expenditures in judicial elections but leaving in place the ban on political party contributions to judicial candidates. The COPP believes this adjustment is necessary so that the public has an accurate version of §13-35-231 MCA before it. An accurate, published version of §13-35-231 MCA lessens confusion and promotes a shared understanding of what is or is not allowed as to political party involvement in Montana judicial elections.

Thank you for your consideration of SB 72.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Motl', with a large, sweeping flourish extending to the left.

Jonathan R. Motl
Commissioner of Political Practices



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*717 F.3d 1090, *; 2013 U.S. App. LEXIS 12755, ***

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff-Appellee, v. TIMOTHY C. FOX,* in his official capacity as Attorney General for the OPINION State of Montana; JAMES MURRY, in his official capacity as the Commissioner for Political Practices for the State of Montana, Defendants-Appellants.

* Timothy C. Fox is substituted for his predecessor, Steven Bullock, as Attorney General for the State of Montana. Fed R. App. P. 43(c)(2).

No. 12-35816

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

717 F.3d 1090; 2013 U.S. App. LEXIS 12755

June 17, 2013**, Submitted

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
June 21, 2013, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Fox v. **Sanders County** Republican Comm., 2014 U.S. LEXIS 1483 (U.S., Feb. 24, 2014)

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the District of Montana. D.C. No. 6:12-cv-00046-CCL. Charles C. Lovell, Senior District Judge, Presiding.

Sanders County Republican Cent. Comm. v. Bullock, 698 F.3d 741, 2012 U.S. App. LEXIS 19522 (9th Cir. Mont., 2012)

DISPOSITION: AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

CASE SUMMARY

PROCEDURAL POSTURE: The U.S. District Court for the District of Montana entered a permanent injunction enjoining defendants, Montana's Attorney General and Montana's Commissioner of Political Practices, from enforcing in its entirety Mont. Code Ann. § 13-35-231, which made it a criminal offense for a political party to endorse, contribute to, or make an expenditure to support or oppose a judicial candidate in a nonpartisan judicial election. Defendants appealed.

The Brennan Center for Justice at NYU School of Law.

JUDGES: Before: Mary M. Schroeder ▀ and Ronald M. Gould ▀, Circuit Judges, and Jed S. Rakoff, Senior District Judge.*** Opinion by Judge Rakoff.

*** The Honorable Jed S. Rakoff ▀, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

OPINION BY: Jed S. Rakoff ▀

OPINION

SUMMARY****

FOOTNOTES

**** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Civil Rights

The panel affirmed in part and reversed in part the district court's permanent injunction enjoining the State **[**2]** of Montana's Attorney General and Commissioner of Political Practices from enforcing in its entirety a Montana statute making it a criminal offense for any political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate" in a nonpartisan judicial election, Mont. Code Ann. § 13-35-231.

The panel held that to the extent that appellants challenged the permanent injunction against enforcement of section 13-35-231's ban on endorsements and expenditures, the panel was bound to follow its prior published decision finding those provisions unconstitutional. *See Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012). Accordingly, the panel affirmed the district court's entry of a permanent injunction as it pertained to those portions of the statute.

The panel noted that in its prior decision of September 17, 2012, the court had not reached the issue of the constitutionality of the statute's ban on contributions and that no such challenge had subsequently been raised. The panel therefore remanded to the district court with instructions to revise the permanent injunction so that it enjoined only the statute's ban on endorsements **[**3]** and expenditures, and not the statute's ban on contributions.

[*1091] OPINION

RAKOFF, Senior District Judge:

On May 29, 2012, appellee **Sanders County** Republican Central Committee ("the Committee") filed suit against appellants, the State of Montana's Attorney General and its Commissioner of Political Practices, seeking a declaration that certain portions of a Montana statute making it a criminal offense for any political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate" in a nonpartisan judicial election, Mont. Code Ann. § 13-35-231, were unconstitutional and requesting an injunction against its enforcement. On June 26, 2012, the district court denied the Committee's motion for a preliminary injunction. On September 17, 2012, this Court reversed that decision, with Judge Schroeder dissenting, and remanded the case for further proceedings consistent with the Court's opinion. *See Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012). Specifically, this Court determined that Montana's ban on endorsements and expenditures by a political party in a

judicial election violated the Committee's rights under the First Amendment, *id.* at 745-48, **[**4]** and that the enforcement of section 13-35-231's prohibition of such endorsements and of the expenditures needed to make those views publicly known should be preliminarily enjoined. *Id.* at 748-49.

Upon remand to the district court, appellants moved for an order vacating the previously-set September 25, 2012, trial date and sought an opportunity to file motions for summary judgment. The district court vacated the trial date and, finding that summary judgment motions would be "superfluous" in light of this court's preliminary injunction opinion, entered judgment on September 19, 2012, permanently enjoining appellants from enforcing section 13-35-231 in its entirety. Appellants now appeal from that judgment.

To the extent that appellants challenge the permanent injunction against enforcement of section 13-35-231's ban on endorsements and expenditures, this panel is bound to follow its published decision finding those provisions unconstitutional. See *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), cert. granted, 133 S. Ct. 476, 184 L. Ed. 2d 296 **[*1092]** (2012) (**HN1**) "[A] published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent **[**5]** to do so'" (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001))). Accordingly, we affirm the district court's entry of a permanent injunction as it pertains to those portions of the statute.

However, the district court, apparently under the mistaken impression that this court had found section 13-35-231 unconstitutional in all respects, entered a permanent injunction against the enforcement of section 13-35-231 in its entirety, including the statute's ban on contributions by a political party to a judicial candidate. In its decision of September 17, 2012, this court had not reached the issue of the statute's ban on contributions, noting that the Committee "does not here challenge Montana's ban on contributions to judicial candidates by political parties." *Sanders Cnty. Republican Cent. Comm.*, 698 F.3d at 744 n.1. Nor in the brief proceedings before the district court after the matter was remanded following our decision did the Committee challenge the statute's ban on contributions. And in its submission on the instant appeal, the Committee once again disavows any such challenge. See *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012) (finding, on a motion for a stay **[**6]** pending appeal, that Montana was likely to succeed on an appeal of a permanent injunction against enforcement of certain restrictions on campaign contributions).

We therefore remand to the district court with instructions to revise the permanent injunction so that it enjoins only the statute's ban on endorsements and expenditures, and not the statute's ban on contributions.¹ The parties shall bear their own costs.

FOOTNOTES

¹ It is clear that the **HN2** statute's contribution ban is severable from its endorsement and expenditure bans, and the parties nowhere suggest otherwise. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161, 177 L. Ed. 2d 706 (2010) ("Generally speaking, **HN3** when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any 'problematic portions while leaving the remainder intact.'" (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006))).

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

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